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No. 451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

ALLENTOWN BROADCASTING CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR ALLENTOWN BROADCASTING CORPORATION, RESPONDENT

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BRIEF FOR ALLENTOWN BROADCASTING CORPORATION, RESPONDENT

QUESTIONS PRESENTED

(1) Whether, on remand for comparative findings on the relative abilities of competing applicants for a new AM radio station, the Commission may abridge the statutory right of hearing to a single issue under Section 307(b) of the Communications Act, and award a permit, on a new interpretation thereof, solely because one of the two communities involved does not have a second local AM radio station.

(2) Whether the court below reasonably concluded that the record contained no substantial evidence to support a finding of comparative equality between the applicants where one applicant had an existing monopoly of com-

munications media, had presented an incomplete program proposal to the Commission, and had been found by the hearing examiner to be uncandid and evasive at the hearing.

3. Whether the Commission acted arbitrarily in rejecting its hearing officer's findings that the witnesses-in-chief of Respondent's rival applicant were evasive and lacking in candor and that their testimony was unreliable and lacking in credibility.

STATUTES INVOLVED

Sec. 307(a) and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(a) and (b) (1952 ed.) provide as follows:

> "(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.
>
> "(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

Selected provisions of the Administrative Procedure Act and other provisions of the Communications Act of 1934, as amended, are included in Appendix A hereto.

STATEMENT

This case involves the assignment of a radio broadcasting station on the frequency of 1230 kc. either to Respondent for operation at Allentown, Pennsylvania, or to Easton Publishing Company for operation in the neighboring town

of Easton, Pennsylvania (R. 156). These applicants, Allentown Broadcasting Corporation and Easton Publishing Company, are referred to herein respectively as "Respondent" and "Easton Company".

The two applications involved in this proceeding were filed in the fall of 1945 and have been subjected to unduly prolonged agency proceedings. The evidence in the "combined record" of the original hearing in 1946 and the second hearing in 1951 became the basis of the agency decision which was reversed by the court below (R. 156, 54).* Most of the evidence considered herein is drawn from the findings of fact in the second hearing, including in particular those of the trial examiner's Initial Decision (R. 53-147).

The decision and record here under review are not dissociated from the several preceding agency decisions and appeal cases which have been rendered in this proceeding, as follows:

Citations	Date	Action
1. FCC Proposed Decision—Unreported (Tr. 1631).	April 28, 1947	Proposed grant of Respondent's application.
2. Original Decision 3 R. R. 1225 (R. 18-24).	June 23, 1947	Granted Respondent's application.
3. Rehearing Opinion 4 R. R. 176	March 25, 1948	Denied rehearing.
4. First Appeal Decision 175 F. 2d 344	May 4, 1949	Affirmed in part; remanded for findings.
5. FCC Second Hearing Order 6 R. R. 21 (R. 42-48)	February 20, 1950	Denied stipulations; ordered second hearing.
6. Mandamus Appeal 185 F. 2d 987	October 23, 1950	Denied writs to prohibit second hearing.
7. Initial Decision (R. 53-147)	June 11, 1952	Proposed grant of Respondent's application.
8. Second Hearing Decision 8 R. R. 31 (R. 156-216)	July 2, 1953	Denied Respondent's application and granted Easton Company's.
9. Rehearing Opinion 9 R. R. 887 (R. 237-263)	August 19, 1953	Denied rehearing.
10. Second Appeal Decision 10 R. R. 2086 (R. 315-332)	August 19, 1954	Reversed and remanded (certiorari granted).

* The FCC's record designation in the instant case includes the first hearing transcript of 1,821 pages and the second hearing transcript of some 3,280 additional pages.

The First Hearing Proceeding

The original hearing was a fully contested proceeding involving four applicants,* two seeking the assignment for Allentown and the other two for Easton (R. 53-54). This was a comparative proceeding on six specified issues (R. 54 n. 3) producing a record of 1,821 pages with some 64 exhibits and 1,122 pages of testimony, and resulting in a FCC determination favoring Respondent over any of the three rival applicants. The FCC conclusion in the original hearing of significance to the questions here presented is in part as follows (R. 24):

> "Upon consideration of the size of the two cities, the existing facilities of each and the amount of radio service available to each, we conclude that Allentown is in greater need of another radio station than Easton; that its need for another radio station is greater than Easton's need for extended services from its existing station, WEST; and that the purposes of Section 307(b) of the Communications Act would be better served by a grant to one of the Allentown applicants than by a grant to either of the Easton applicants."

The next following conclusion contains a detailed comparison between Respondent and the other Allentown applicant, resulting in a preference of the former, 3 R.R. 1235-36, (R. 24).

The First Appeal Decision

On appeal of the first FCC decision, *Easton Publishing Company* v. *FCC*, 175 F. 2d 344, 351, the court ordered—

> "The case must be remanded for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need. *Upon the other points at issue, the conclusions of the Commission are affirmed.*" (italics added)

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* By the time of the second hearing order, two of the applicants had dropped out, leaving only Respondent and the Easton Company.

The appeal issue which persuaded the court to remand the case for further findings was ". . . that the Commission should have made findings as to the service presently available to each community in terms of radio programs." The precise deficiency in the Commission's findings was expressed by the court as follows (175 F. 2d at 349):

> "The record contained evidence upon the programs. The Commission made findings as to the composition and character of the program proposals of the two applicants. But it gave no indication of their comparative qualities, or of the lack of any particular type of service in either community, or of the greater ability of either applicant to meet that need."

The court viewed the case as one involving ". . . a comparative consideration of two communities and of two applicants" and stated the interrelation of the two considerations as follows (175 F. 2d at 346-7):

> "If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements, of the applicant to render service are immaterial. But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved.
>
> * * *
>
> "If an applicant has not the bare minimum qualifications for a license, no great harm is done by its denial. But a choice between two well-qualified applicants necessarily means a substantial economic denial as well as an economic award. And, in respect to competing communities, the award means denial to one as it means advantage to the other."

Second Hearing Order

In June 1949, the month following the first appeal decision, the three applicants then remaining in the case filed a joint motion and stipulation (R. 30-31) which was shortly

followed by the separate filing of petitions for supplemental findings (R. 32-41). With these further submissions both Respondent and the Easton Company concluded their cases on the open-ended issue of the remand judgment.

The following February (1950) the Commission, instead of further deciding the case as submitted by the parties, issued an Order which (a) rejected the joint stipulation, (b) set aside the original decision which had been affirmed in part, (c) reopened the original hearing record, designating the applications for further hearing upon eight specified issues, and (d) provided twenty days for amendment of applications to bring them up to date (R. 42-48).*

Thereafter, Easton Company on March 17, 1950, filed in the court below a motio.. for writ of prohibition and mandamus ". . . to prevent the Commission from reopening the case and holding a further hearing and to require it to make findings on the original record . . ." including the joint stipulation. Respondent joined in this effort by filing on March 23, 1950, a motion for leave to file a petition for writ of mandamus. The court denied these petitions, holding that such writs could not be substituted for the statutory appeal ". . . from a denial of an application . . .", and that the matters stated in the pleadings were considered to have ". . . no validity as against the *power* of the Commission to hold the further hearing upon the issues above specified." *Easton Publishing Company* v. *FCC*, 185 F. 2d 987, 991.

The efforts of both applicants to bring this case to a conclusion were blocked, leaving no choice except to undergo a second full hearing or default.

The Initial Decision

The Commission's trial examiner who conducted the second hearing proceeding released an Initial Decision on June 11, 1952, proposing a grant of Respondent's applica-

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* Second Hearing Order also authorized Respondent's station WHOL to continue operation pending hearing and final decision. (See page 10, *infra*).

tion. This was predicated upon detailed evidentiary findings addressed to the hearing issues in the case (R. 57) and the remand issue of the first appeal decision (R. 56).

On the inter-community issue, the trial examiner concluded (R. 145):

> "This is not a case in which a city is without local broadcast transmitting facilities nor is it a case where a choice of programs is not available to the residents of both cities. The mere fact that there are three stations in one city and one station in the other is not controlling in reaching a determination on the comparative needs of the two communities."

On consideration of the issue of relative applicant abilities, the trial examiner concluded that the testimonial evidence of the Easton Company's witnesses was unreliable (R. 146) and that the evidence was insufficient to disclose ". . . with the required certainty the program services which would be rendered by the proposed station at Easton . . ." (R. 143).

Further, upon a comparative consideration of the applicants and their respective service proposals (R. 127), the trial examiner concluded (R. 147):

> ". . . that a more fair, efficient and equitable distribution of radio facilities would be attained and public interest, convenience and necessity better served by the grant of the Allentown Broadcasting Corporation application . . ."

The Second FCC Decision

Under the Commission's procedure for the review of initial decisions, exceptions were filed and oral arguments were held before the Commission February 24, 1953. The Commission's decision here under review was rendered July 2, 1953, reversing the trial examiner and ordering a denial of Respondent's application and a grant of Easton Company's. This decision was entered with two Commissioners not participating and one dissenting (R. 156).

The Commission concluded that ". . . there is little room for choice between the two communities." It awarded the station to Easton to give that community two standard broadcast stations and a resulting "choice of service", which was presently available to Allentown from its three stations. This was held to be the "one decisive factor" (R. 211).

The Commission ". . . rejected the conclusion of the Hearing Examiner that the record does not disclose with the 'required certainty' the program service which would be rendered by the Easton applicant . . ." (R. 214). The Commission set aside the findings of the trial examiner holding oral testimony of the Easton Company witnesses lacking in credibility (R. 205).* This reversal of the hearing officer's conclusion on demeanor evidence was stated to be on the ground that it was based on "testimony by one witness" rather than a judgment of "different witnesses who make contradictory statements" (R. 205).

The Commission's decision is pivoted on the so-called choice-of-local-AM-service holding. It did *not* rule that the issue of comparative applicant abilities is immaterial, but neither did it contain any ultimate findings which are sufficient or adequate on this issue.

The Commission's 1953 decision details no consideration relied upon for reversing its order in the first hearing decision, excepting only that attributable to the comparison that "Allentown is presently served by three standard broadcast stations . . ." whereas ". . . only one standard broadcast station is located in . . . the Easton community" (R. 211-12). Such a comparison takes into account against Respondent the fact that station WKAP is operating full-

* The Commission's ruling, following reference to the *Universal Camera Case*, (340 U.S. 474) was as follows (R. 260-61):

> "However, nothing in that case nor any of the decisions or statutes with which we are familiar deprives this Commission of its responsibility for making its own independent evaluation of the evidence of record upon which material conclusions of this nature are based."

time in Allentown (R. 191) as a result of an intervening 1950 grant, as to which Respondent was held to have no standing (R. 311). On the other hand, although the Commission's decision takes note of its December 1952 grant of a television station to the Easton Company for operation in Easton (R. 165), it gives no consideration to this authorization on the issue of the distribution of "radio service" between the two communities (R. 213, 260).*

The Second Appeal Decision

The court below reversed the Commission's decision and remanded the case for redetermination (in accordance with newly enacted Sec. 402(h)). The remand required that ". . . the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct on the issue of the relative abilities of the two applicants to serve in the public interest" (R. 322). The court's holding, addressed to the issue of comparative applicant abilities, was that the Commission's findings of substantial equivalence on this issue were deficient, unsupported by and contrary to substantial evidence. The opinion states ". . . we think there is no substantial evidence in the record as a whole—including the Hearing Examiner's Initial Decision —to support the essential underlying findings that the ability of the applicants to serve their respective communities was about equal" (R. 317-18). This is the issue on which the Commission's decision was reversed.

The questions here presented raise a doubt as to whether the Commission *did* make findings on the issue of comparative applicant abilities, as held deficient by the court below, or whether the Commission *did not* make findings on such issue at all, as now contended by the Government.

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* "While television is of course an important medium of mass communications the existence or lack of existence of this visual media can hardly be determinative of which of two communities is most in need of an additional standard broadcast facility to provide aural broadcast service" (R. 260).

Circumstances of the Operation of Respondent's Station

A station construction permit was issued to Respondent after the original hearing decision (R. 25). Under this authorization Respondent's station WHOL was constructed and placed in service September 3, 1948. It has been in continuous service since that date. A regular license was issued to Respondent February 2, 1949 (R. 27-30). An application for renewal of license was filed on October 30, 1951 (R. 149) and is still pending. The outstanding authorization to Respondent allows operation of station WHOL pending final decision in this case (R. 48, 159).

SUMMARY OF ARGUMENT

I.

Although the earlier decision of the court below, which the Commission did not seek to review, specifically directed it to make comparative findings on the relative abilities of the two applicants, the Commission now belatedly seeks to evade this directive by contriving a novel statutory interpretation presumed to govern this case. In its current view, the Commission maintains that the single "decisive factor" impelling a grant to the Easton Company was the absence of a second *AM radio* broadcast station in Easton, and that no comparison of the relative abilities of the applicants was necessary or proper. Such a contention, if upheld, would arbitrarily deprive competing applicants for a new station in one of two neighboring communities of the full hearing, on all relevant issues urged, to which they are entitled by the provisions of the Communications Act, and deprive the public of the benefit of the agency's expert judgment in licensing the better qualified applicant when a choice is possible.

Section 307(b) of the Communications Act, directing the Commission to make a fair distribution of radio service throughout the nation, may be a comparative factor of persuasive force in certain situations, but under no cir-

cumstances should be applied so as to exclude other standard comparative issues between competing applicants for the same facilities. Nothing in the legislative history of this section indicates that it must be interpreted arbitrarily to the exclusion of other factors. If the Commission's novel principal contention were correct, the adjudication of contested applications for the same facilities in neighboring communities would become an empty administrative formula, with the Commission's statutory duty to hear and decide cases on the evidence abandoned in favor of an arbitrary rule of thumb. Such a formula would give an unprecedented importance to a provision of the Communications Act which is properly of little significance in the present advanced state of the standard broadcast industry.

Moreover, the Commission's extension of Section 307(b) to the facts of the present case is in any event an unjustified and arbitrary application of that provision. The two communities involved here are relatively closely balanced in their need for an additional broadcast service, and, if anything, Respondent's community, in terms of present population, rate of growth, and existing broadcast service, is somewhat more deserving of a new facility than Easton. The Commission's arbitrary preference of Easton because it now has only one AM radio broadcast station (although it enjoys a multiplicity of broadcast services above the national average for comparable cities) is unprecedented, with one possible exception, in Commission and court authority and is contrary to previous agency and court decisions.

II.

The court below reasonably and properly concluded that the Commission's decision was devoid of substantial evidence in the record to support a finding of approximate equality between the applicants. The court's conclusion was based on three areas where the record indicates the comparative superiority of Respondent, all of which were either totally ignored or minimized in the Commission's

decision. Militating against any finding of comparative equality between Easton Company and Respondent are the facts that a grant to Easton will augment and consolidate the Easton Company's existing concentration of control of the mass media of expression in Easton, and may be used unfairly to extend that monopoly; that as a result of tainted testimony by its principals, the Easton Company's program proposal is shrouded in uncertainty; and, finally, that the Easton Company in its conduct before the Commission and the trial examiner has not displayed the forthrightness which may properly be expected of candidates for broadcast licenses.

In addition to the areas chosen by the court below to illustrate the need of reversal for inadequate findings and a remand for further consideration by the Commission, other comparative differences between the applicants appear in the record on which no findings were made sufficient to support or justify a conclusion that the parties are equally entitled to the facilities sought.

III.

The court below properly reversed the Commission's unwarranted rejection of its examiner's conclusion, based on her observation of the demeanor of Easton Company witnesses, that they betrayed an attitude and gave an impression of evasiveness and lack of candor. The court properly held that these findings by the examiner on the lack of credibility of the Easton Company witnesses, based on their demeanor during oral testimony, should not have been rejected by the Commission reviewing the cold record of the hearing in the absence of compelling recorded evidence to the contrary.

Moreover, the court's emphasis on the weight which must be accorded by agencies to findings based on demeanor of witnesses by a trial examiner is peculiarly appropriate in the case of the Federal Communications Commission. By recent enactment, Congress has vested in the trial examiners of the FCC enhanced responsibility

for finding the facts and limited the role of the Commission itself largely to that of reviewing the ultimate policy and legal questions arising from the facts as found.

I

THE STATUTORY RIGHT OF HEARING ON COMPARATIVE ISSUES BETWEEN RIVAL APPLICANTS MAY NOT BE ABRIDGED TO A SECTION 307(b) ISSUE ONLY

In joining issue with the first contention* in the Government's brief we would emphasize that the question is not one of abstract statutory interpretation, administratively applied, but rather one of the function of a Section 307(b) question in a comparative case proceeding between rival applicants determined upon evidence in a statutory hearing proceeding.

Under FCC practice, the usual case proceeding on comparative issues is one which involves a choice of one of competing applicants for the same assignment. Such a proceeding brings forth an interplay of claims of superiority which comparatively weighed entitles one applicant to be preferred over the other. These claims to preference may be divided broadly into three groupings: (a) background and experience of the applicants; (b) plans for management and operation of the station; and (c) detail of program proposals and services.** A comparative pro-

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* It is Respondent's position that the Government's first contention, i.e. that Sec. 307(b) is independently controlling, was not raised or decided by the court below, and hence should not be considered here. *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 468; *Owens* v. *Union Pacific R. Co.*, 319 U.S. 715, 724-725, *Helvering* v. *Cement Investors, Inc.*, 316 U.S. 527, 535; *Helvering* v. *Wood*, 309 U.S. 344, 348-349.

** A comparative proceeding normally presumes that each applicant is basically qualified, legally, financially and technically. This may be administratively determined by the Commission. Sec. 309(b). *FCC Annual Report, 1953* states, p. 108: "In addition, findings are now made on the basic qualifications of the applicants (legal, financial, technical, etc.) before designating them for hearing on comparative qualifications. In most instances this has eliminated lengthy testimony on matters upon which no actual controversy exists."

ceeding normally presumes that both applications could be granted except for their mutual exclusivity which makes necessary a choice as to which grant will *better* serve public interest, convenience or necessity.

This description of a "comparative case proceeding" should be acceptable as applied to those cases where the contested assignment is sought for the *same* community.

In a case where the applicants are competing for an assignment to be used in *different* communities, there is brought into play the additional Section 307(b) issue. Under FCC practice and in all such case proceedings to our knowledge, including the one at bar, the hearing issues specified by the Commission have embraced without distinction all questions of comparative applicant and service considerations and the additional inter-community issue. In no case to our knowledge has there been any practice or attempt to sever or isolate a Section 307(b) question from the other comparative hearing issues.

The Government is here contending for an interpretation of Section 307(b) which would rule out issues of comparative consideration between applicants and their service proposals and restrict a case determination to the sole question of the fair distribution of radio facilities between communities. To this extent, the right of hearing accorded applicants in FCC comparative case proceedings would be abridged.

A. The Interpretation Advanced Would Not Be Controlling in This Case

It is unrealistic to contend that the presence of a Section 307(b) question in a case makes that issue independently controlling. The practical circumstances are that an adjudication of a Section 307(b) issue admits of three possible results: Situation One, Section 307(b) is the dominant factor; Situation Two, Section 307(b) is a significant factor but outweighed by others; or, Situation Three, the Section 307(b) issue is of no significance. For example,—

Situation One. Assume Community A and Community B, equal in population, have equal services from distant stations and are otherwise equivalent, except that Community A has one local broadcast station and Community B has none. The requirement of equitable distribution may reasonably be the dominant factor notwithstanding the superiority of the Community A applicant on other comparative considerations.* However, even in such a case the FCC is disabled by the Act from making a determination in favor of Community B administratively. Sec. 309(b) and (c). To illustrate, in this case Respondent originally applied for the second station in Allentown, which was three times the size of Easton. Easton also had one station and as much service from outside stations as Allentown. Nevertheless, the case went to hearing on full scale comparative issues.

Situation Two. Assume the Community A and Community B circumstances as above stated except that Community A has one full-time station and Community B has one daytime only station. In this case, with other factors substantially equal, Section 307(b) may balance in favor of Community B. Suppose, however, the Community B applicant is a non-resident or has failed to show a "high

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* Cf. *Metropolitan Broadcasting Company*, 5 R.R. 532, cited by the Petitioner (Brief, p. 30), where the Commission was faced with a choice between giving a new standard broadcast station to San Antonio, Texas, which already had *eight*, or to Alamo Heights, which had *none*. Similarly, in the *Radio Cincinnati* case, relied upon heavily by Petitioner, the decisive importance given to Section 307(b) was based upon the fact that the favored applicant would bring a *first* daytime broadcast service to some 5000 persons in an area of 550 square miles. The court below regarded this difference (not present in this case) as "of vital significance" in affirming the Commission's decision (177 F. 2d 92, 95). This case was unique on its facts since the Commission had proposed a grant of both applications with a condition that the Cincinnati applicant construct a directional antenna. Refusal of this engineering condition resulted in the dispute.

sense of public responsibility",* whereas the Community A applicant on these counts was clearly superior. Community A may reasonably be preferred despite the Section 307(b) preference to Community B.

Situation Three. Make the same fact assumptions as to Community A and Community B except that each one has one full-time station with the same power and otherwise equal. In such case the practical necessity and requirement of the statute compel a determination of the case on other issues notwithstanding that two communities are involved.**

The third situation is illustrated by the following FCC decisions: *In re Southeastern Massachusetts Broadcasting Corp.*, 12 F.C.C. 363, 371:

> "Comparison of the populations of the respective cities, the nature of existing stations located in the communities and other broadcast signals and program services available to the cities would indicate a slight preference for New Bedford, while considerations of the most efficient use of the frequency indicates a preference for Fall River. Under these circumstances, in our opinion, the requirements of section 307(b) for a fair, efficient, and equitable distribution of radio facilities appear to be so closely balanced as not to warrant a clear preference of one city over the other. Accordingly, our determination has been predicated upon considerations other than those arising from section 307(b) of the act."

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* See *FCC Sixteenth Annual Report*, 1950, p. 99:

"Broadcast stations are licensed to serve 'the public interest, convenience and necessity.' Because radio channels are limited and are a part of the public domain, it is important that they be entrusted to licensees who have a high sense of public responsibility."

** Similarly, Section 307(b) will not apply at all where the two applicants, although technically applying for different communities, will actually serve a common larger area. This was the case in *Huntington Broadcasting Company* v. *FCC*, 192 F. 2d 33, cited by Petitioner (Brief, p. 30).

In re Metropolitan Broadcasting Corp., 12 F.C.C. 601, 607:

> "In view of the foregoing considerations, we conclude that the requirements of section 307(b) of a 'fair, efficient, and equitable distribution of radio service' are balanced to such an extent that no clear preference can be made under this section in favor of one of the two applicants in this proceeding. Hence, we must make a choice in this proceeding by a comparison of other merits of the two applications before us."

The interpretation here advanced by the Government that Section 307(b) is necessarily controlling in this case is not warranted on the record here under review. The trial examiner's finding on the Section 307(b) issue was ". . . that a more fair, efficient and equitable distribution of radio facilities would be attained and public interest, convenience and necessity better served by the grant of the Allentown Broadcasting Corporation application." In the Commission's decision the finding on this issue is that ". . . there is little room for choice between the two communities." It is Respondent's contention that, viewed most favorably to Petitioner, Section 307(b) in this case is not of any substantial significance and isolated from other issues does not compel or prevent a grant of either application on the evidence and findings of record. This case is within the third situation above described and analogous to the above cited case decisions.

B. The Government's Interpretation of Section 307(b) Is Unwarranted

The interpretation here advanced by the Government is unprecedented. No FCC case or appeal decision to our knowledge holds that the presence of a Section 307(b) issue in a comparative FCC proceeding renders other issues immaterial. Such an interpretation lacks any legislative support.

The hearing issues specified in the case at bar, other than Section 307(b), were not ruled immaterial in the Commission's decision. The decision of the Court below only

serves to emphasize the materiality of non-Section 307(b) issues, and *on this point there is no difference between the majority and minority opinions.*

The Commission interpretation is decidedly abstract. If there is to be a severance of the Section 307(b) issue from those germane to the public interest, convenience or necessity, we are not told what criteria are to be included or excluded. We are not given any detail of the scope or limitations of such interpretation. We are not told how the administration will be changed. We are not given the procedural modifications of such a single-issue adjudication. It is all too vague.

If such a FCC case proceeding is to be a one-dimensional affair, we need to examine the terms of Section 307(b). The objective sought is an "*equitable distribution of radio service.*" This objective is to be achieved by "*distribution of licenses, frequencies and of power.*" The areas of distribution of such facilities and of such "radio service" are "among the several states and communities." None of these terms (except "license") is defined by the Act (Sec. 3). Section 307(b) is not clarified by any implementing rules of the Commission.*

Legislative History. Section 307(b) has not been considered by Congress since its amendment in 1936, 49 Stat. 1475, and the intent of this amendment was merely to restore the original provision (Sec. 9) of the Radio Act of 1927, 44 Stat. 1166. Explanation of the 1936 amendment was given succinctly in Congressional debates as follows (80 Cong. Rec. 6032):

> "Mr. King. What is the purpose of the bill?
> "Mr. Wheeler. The purpose is to restore the provisions of the original act.

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* Rule 3.24 of the Commission's Rules requires each applicant for broadcasting facilities to make a satisfactory showing on eight items including Sec. 307(b). 47 CFR 3.24.

"The original act contained practically the same provisions as the bill in question."*

Congress in 1952 rather generously overhauled the Communications Act of 1934 by passage, after a decade of consideration, of the McFarland Act, entitled "Communications Act Amendments, 1952," 66 Stat. 711 *et seq.* No revision was made in Section 307(b). The "legislative age" of "equitable distribution" of radio service is 1927.

From the original provision in the 1927 Act (44 Stat. 1166) through the Davis amendment of 1928 specifying a zone-state quota system (45 Stat. 373), through the later exemption therefrom in 1934 of low power local stations (48 Stat. 1083), to the return in 1936 to the original language (49 Stat. 1475), there appears a general intention of assuring a fair distribution of "radio service" to all states and population centers of the United States. The main thrust of this legislation in each of its three forms was to allay fears of Congress that a federal agency might discriminate against any state or section, particularly

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* The original language of the 1927 Act provided:

"... the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different states and communities as to give fair, efficient, and equitable radio service to each of the same." 44 Stat. 1166.

The Radio Act of 1927, Sec. 2, 44 Stat. 1162, divided the country into five zones. House Report No. 404, 69th Cong., in explaining these zones, stated:

"The bill creates within the United States five zones *of approximately equal population.* (italics added)

It was these zones, *created according to population*, which later became the basis for the Davis amendment (45 Stat. 373):

"Sec. 9 ... the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service ... and ... the licensing authority ... shall make a fair and equitable allocation of licenses ... *according to population.*" (italics added)

The *equal-population zones* were *unequal in areas, unequal in the number of states and number of communities* within each zone.

western states. It was a manifestation of the rights of states in the evolution of a new medium to seek equality in radio service.

The principal effect of the 1936 amendment was to release the Commission from the strait jacket imposed by the arbitrary zone and state quota system, and to de-emphasize the undue attention given to the facility aspect in contrast to the "radio service" aspect. This 1936 change again subordinated "equitable distribution," facilities or service, to the broad standard of public interest, convenience or necessity.

An illuminating exposition of this subject is given in the 1930 *Report of the American Bar Association's* standing *Committee on Communications*. Chairmanned by the late Louis G. Caldwell, the first General Counsel of the Federal Radio Commission. 55 A.B.A. Rep. 350, 372-380. The Report comments on the original provision as follows:

> "The Radio Act of 1927, as originally drafted and passed, covered the subject of geographical distribution of broadcasting stations in ideal fashion. After prescribing that the licensing authority should be guided in its actions by the standard of 'public interest, convenience or necessity,' it directed that 'the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.'
>
> "Even if this direction had not been incorporated in the act, a proper interpretation of 'public interest, convenience or necessity,' in the light of the purpose of the act, would necessarily have implied an equitable geographical distribution of broadcasting stations."

This ABA Report of 1930 recommended a "return to the original language," which is the solution eventually adopted by Congress in 1936 and which remains in effect today. Without detailing the legislative history on this subject, we are satisfied that Section 307(b) means nothing

more or less than that clearly indicated by the ordinary meaning of its terms, and that it was intended, not to give rise to arbitrary action, but as a guide to the proper application of the broader standard of public interest, convenience or necessity, aptly characterized as the "touchstone" of this Congressional delegation. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216. See *F.R.C.* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266.

With the possible exception of the Davis amendment, repealed in 1936, we can find no indication of any legislative intention from 1927 to date that Section 307(b) was to be an "overriding mandate" in adjudicating radio case proceedings.

C. Proposed Interpretation would Result in Arbitrary Procedures

If the Commission's newly found interpretation of Section 307(b) were adopted, we are not told how the handling of FCC case proceedings would be consequentially restricted. We are not given any suggestion as to the resulting procedural revisions. If a case proceeding involving two communities is to be limited to their respective needs in terms of the provision of Section 307(b), what factual showing would be germane to this single issue?

The following factors would seem material to such a Section 307(b) case (assuming a Section 309(b) administrative determination of applicant minimum financial, legal and technical qualifications):

a. *Population*, e.g., the comparative size of the two communities. Should a community twice the size be granted twice the facilities?

b. *Population to be Served.* What population actually resides within the good service contour of each station?

c. *Average Population-per-Station.* Considering a division of the available population audience equally among the available local transmitting channels, what is the average population per station?

d. *Radio Service-Local Stations.* What is the number of stations which originates programs in the community?

e. *Radio-Service-Reception.* What is the number of signals available in the community for good service from stations operating in other states or communities?

f. *Efficiency.* What are the comparative interference considerations; the ability of the proposed station to give complete coverage to the community; initial service to areas receiving no signal, etc.

The above factors may be applied in a comparison between the two communities involved; or, they may be projected horizontally to a nation-wide comparison of other communities similar to those in issue. If the comparison involves different states, we are not told how Section 307(b) factors would be considered in terms of the total facilities and total radio service of each state or what considerations other than population and area would determine a fair distribution between them. We are not told how community comparisons will foster radio service to rural areas.

Commonly considered factors at issue in other comparative proceedings, not germane to Section 307(b), include the following: (a) relative applicant qualifications, (b) diversification of control over communications media, (c) local residence and ownership, (d) civic activities and awareness of community responsibilities, (e) programming and operating plans, (f) past experience, (g) monopolistic practices, (h) integration of ownership and management, etc. See 2 R.R. 1451 and p. 13, *supra.* The Government's interpretation would discharge the Commission from any responsibility to consider such public interest factors in any case proceeding which involved assignment to one of two communities. In any such two-community case, the FCC would make no attempt to determine which grant would better serve the public interest.

A hearing proceeding limited to a factual showing material to the terms of Section 307(b) would hardly be a

hearing at all. *Population* and census data may be officially noticed or stipulated. *Population Served* is a matter of routine engineering computation of the service contours of the station and tabulation of the population distribution therein. *Local Stations* involves merely a transmitter count from the trade publications or FCC license files. *Receivable Signals* available to a community from stations in other communities may be established by office computations or field measurements. Such data is quite routine and not normally a matter of dispute. *Efficiency* in terms of frequency or power is a question which has separate significance under FCC Standards of Good Engineering and is usually included with the application and passed upon in most instances administratively. Evidence on these matters is not normally contested between applicants.

Any of such formal facts can be administratively determined by the Commission from the application and other data and may be eliminated from the issues specified in the pre-hearing notice under Section 309(b). Adoption of the Government's interpretation would have the effect of empowering the Commission to determine administratively all facts which it would consider material to a Section 307(b) determination. For example, in the instant case what the Commission states as the "one decisive factor" is that Easton has only one AM station. Ascertainment of this fact would not warrant a hearing, much less one of ten years duration and an "involuntary" complete second hearing.

If an FCC proceeding on contested applications may be confined to a Section 307(b) issue only, the effect will be to deny the right of hearing in such cases. Such arbitrary constriction or denial of hearing would be contrary to the Congressional intention stated in Section 309(b) that any hearing "shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate." This expression, read in conjunction with the protest procedure permitted under subsection (c), requires and permits those hearing issues which will embrace a full

hearing and an adjudication of the claims of all parties in interest. FCC practice recognizes the right of parties to add issues in addition to those specified by the Commission. Rule 1.389. Such right would be foreclosed by an interpretation confining a case to the single Section 307(b) issue.

FCC rules of practice contain no provision giving support for the present contention that a comparative proceeding which involves two communities is limited to a Section 307(b) issue. There is no procedure for the severance of the Section 307(b) issue from other customarily considered comparative issues or for the trial in successive stages of the 307(b) issue, and if that is not decisive, the other specified issues. No such procedures presently exist.

The effort being made in this case to constrict the right of hearing is similar in purpose and effect to two previous efforts which were upset in *FCC* v. *National Broadcasting Co.*, 319 U.S. 239, and *Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327. In the *NBC* case, *supra*, station KOA in Denver was denied a hearing by the FCC despite electrical interference to its authorized service resulting from the grant of a license to a Boston station to operate nighttime on the frequency used by KOA as a clear channel station. The denial was held to be reversible error. In the *Ashbacker* case, the Commission administratively granted one of two mutually exclusive applications for the same assignment in two Michigan communities, Grand Rapids or Muskegon, and designated the unsuccessful application for hearing on comparative issues. The denial of a right of hearing prior to an adjudication of the hearing issues involved was held to be reversible error. This decision interpreted the Act as granting applicants a full right to a comparative hearing even though two different communities are involved.

D. Section 307(b) is Seldom of Any Significance in Present-Day FCC Broadcast Cases

No one will seriously question the objective of equality in radio broadcasting service. That is not the point in issue here. Rather, the question is, of what present-day significance is Section 307(b) in the further evolution of radio broadcasting services?

In the standard broadcast band (540-1600 kc.) there are presently assigned in the United States 2,697 AM stations. Whatever degree of equality there may be in this class of radio service is a *fait accompli*. During fiscal year 1954, there was a net increase in standard (AM) broadcast stations of 113. "Most of the new grants were for local low-powered day-time only stations." *FCC's 20th Annual Report, 1954*, p. 6.

Assignment of television stations has been the principal activity of the Commission in the broadcast field since 1952. There are 603 TV assignments. However, the possibility of a Section 307(b) issue in a television case proceeding is all but nil. Television assignments have been allocated to communities under a nation-wide plan.* This plan includes "A Table of Assignments" which allocates discrete frequencies to named cities, 47 CFR 3.606. Thus, in the case of television radio service, whatever order of Section 307(b) equality may exist, it was largely formalized in April 1952. Rule 3.607 of the Commission's Rules, 47 CFR 3.607, provides in part:

> ". . . applications may be filed to construct television broadcast stations only on the channels assigned in the Table of Assignments and only in the communities listed therein."

Frequency modulation (FM) broadcasting stations, 88-108 mc., total 569. There was a net reduction of 32 in the number of this class station during fiscal year 1954. FM

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* Such master plan, promulgated as a rule, was upheld in *Peoples Broadcasting Co.* v. *United States*, 209 F. 2d 286; and in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24.

broadcast assignments, somewhat similar to television, were predicated upon a nation-wide allocation plan. *FCC 12th Annual Report*, 1946, p. 16.

Of the three major classes of radio broadcasting services, television, frequency modulation and standard AM broadcasting, a Section 307(b) hearing issue, for all practical purposes, is possible only in case proceedings on AM applications. The existence of a Section 307(b) issue in an AM case proceeding is most infrequent. All but a fraction of AM station authorizations are granted without a hearing in which case no consideration is given to any Section 307(b) question. A Section 307(b) issue would arise only when specified in a FCC hearing notice issued under Section 309(b). For example, during fiscal year 1954, the Commission granted 142 AM authorizations. During the same period, the FCC entered only 6 initial or final decisions in contested AM broadcast cases. None of these cases involved a Section 307(b) issue. The possibility of a Section 307(b) issue, with minor exceptions of no particular significance, can arise only in the case of mutually exclusive applications for an AM station in different communities. For example, the Commission in its brief (p. 22) before the court below in this case argued:

> "The necessity for considering the needs of the two communities here arose solely from the fact that only one of them could be awarded an additional station in this proceeding. If WKAP's application were before the Commission today (and there were no mutually exclusive applications), it could be granted, as it was in 1950, without any regard for the number of other stations in either Allentown or in Easton."

The Commission's current annual report to Congress, a 20th anniversary highlight, makes no mention of the distribution of broadcast facilities or of any Section 307(b) problem. The Commission's 4th and 5th Annual Reports to Congress, in 1938 and 1939, do contain detailed information, statistics and tables on "distribution of broadcast facilities" (p. 50, p. 36, resp.) but the main emphasis in

these studies, which began in 1935, was on service to rural listeners, *FCC 1st Annual Report, 1935*, p. 31. Annual Reports of the Commission during following years did publish statistical data on "broadcast distribution," but apparently even this was discontinued in 1950. *FCC 16th Annual Report*, p. 115-117.

During the ten-year period preceding 1952, Congressional hearings were held upon various bills to amend the Communications Act of 1934 which culminated in adoption of the McFarland Act on July 16, 1952, 66 Stat. 711. The Congressional reports on this extended legislation dealt with many subjects of current concern, but not the problem of equitable distribution of radio service or Section 307(b).

E. Choice-of-Local-AM-Transmission-Service is an Arbitrary and Unwarranted Ground of Decision in This Case

The Commission's decision in this case is based on the simple fact that Easton has only one AM station. The reasoning is that in a case proceeding involving a choice between two communities, that community which has only one standard broadcast station is to be preferred. This preference is to be given the one-AM-station-community without any regard to the comparative merits of the applicants or their service proposals, or even the Section 307(b) factors outlined *supra*, pp. 21-22.

If this were a proper rule of law, the effect would be to restrict the right of hearing to a simple fact, *i.e.*, has the smaller community but one AM station? If this is to be a proper ground for decision regardless of other significant factors, then Respondent's case was non-suited at that point in this ten-year proceeding when the Commission granted a second radio station to Allentown. Any such rule is patently arbitrary. It would reduce the Commission's function to that of counting transmitters, would completely defeat any comparative consideration and would circumvent the expressed requirement of the Act that FCC decisions shall include findings and the basis therefor "upon all material issues," Section 409(b).

The Commission's new-found proposition of a "choice of local service" carries an implication, at least partially, that Easton is lacking in a choice of "radio service." By no standard of comparison can Easton be regarded as an "underserved community."

Radio service, the term used in Section 307(b), as applied to "broadcasting" means "the dissemination of radio communications intended to be received by the public, . . . ", Section 3(o). The Commission's most recent Annual Report to Congress which included data on "broadcast distribution," states as follows (FCC Annual Report, 1950, p. 115):

> "The more than 3,100 authorized commercial AM, FM, and TV broadcast stations at the close of the fiscal year were distributed throughout nearly 1,300 communities in the United States and its possessions. All but 20 of these communities had at least one authorized AM station. The remaining 20 communities had FM authorizations only. A total of 384 communities had one or more authorized FM stations, and 66 cities had TV authorizations."*

Easton now has four local radio broadcasting services: one AM radio station (WEST), two FM radio stations (WEEX and WEST/FM), and one TV station (WGLV) (R. 188). Easton and the Easton area receive radio services from a number of standard broadcast stations operating in other communities. Station WOR, New York City, serves Easton day and night. At least nine radio stations furnish service to varying portions of the area which would be served by the proposed Easton Company station. Daytime service is rendered to all of the Easton rural area by five stations; to 90% of the area by two additional

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* The FCC Annual Report, 1954, at p. 109 states there are nine million FM radio receiving sets in use and thirty million television sets of which four million can get the UHF channels. Easton Company's advertisement in the 1953 Telecasting Yearbook-Marketbook (published August 17, 1953) on its new television station WGLV gives the number of UHF television sets in the Easton area as 24,600.

stations; to 70% of the area by two additional stations; 50% of the area by four additional stations; 40% by one station; and nine other stations serve under 40% of Easton's rural area. At night five stations provide primary service to all of the rural area in the Easton vicinity. (R. 190)* Easton community does receive a choice of local FM radio broadcasting service. (R. 188)

A comparison of Easton with other communities of the United States in the same population bracket, and outside of metropolitan areas or adjacent to large cities, disproves any assumption that Easton is underserved.

Appendix B lists the broadcast facilities assigned to 37 communities comparable to Easton. The communities used as a base of comparison are taken from a list of cities published in the 5th FCC Annual Report, 1939, having in excess of 25,000 population and *no local broadcast service.*** The 1950 census of these cities varies from 27,000 to 78,000. and averages about 40,000 or 4,000 in excess of Easton. Two of these cities have no AM station: twenty-four out of the 35 remaining cities have only one AM station. Less than one out of three has an FM radio station or a TV radio station. Of these 37 communities the average of broadcasting facilities, AM, FM and TV, is 1.8. Easton, in contrast, has *four* radio broadcasting facilities.

A parallel comparison between Allentown and other comparable cities supports the additional assignment to Respondent. Appendix C lists 20 cities in the general population bracket of Allentown and outside of larger metropolitan areas and shows the AM, FM and TV assignment to each. Five of these cities have six AM stations; four have five AM stations; and two have four AM stations. The average is 4.1 AM stations, 1 FM station and 1.3 TV

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* The record does not show television service received in Easton from stations in other communities, or radio service received from other FM radio stations.

** The total number was 133. Appendix B excludes those within metropolitan districts or contiguous to larger cities, leaving a total of 37 generally comparable to Easton.

stations. Allentown now has three AM stations, two FM stations and one TV station.* This is below the average of broadcasting facilities assigned to comparable cities.

A comparison of broadcasting facilities, excluding the assignment in contest, licensed to Allentown and to Easton as of the date of decision, is as follows: Easton had four broadcasting stations; Allentown, five. Of these Easton had one AM station and Allentown, three; each had two FM radio stations; and Easton had a television station; Allentown had no television.

The radio service available to Allentown from AM radio stations operating in other communities is about comparable or, if anything, slightly less than such radio service available to Easton (R. 191).

The above comparison between Allentown and Easton and between Allentown and the other comparable 20 cities fails to give due credit to Allentown for being the principal city in the Allentown-Bethlehem metropolitan district, population 173,000. A true comparison must take into account the fact that Bethlehem with a population of 66,000 is immediately adjacent to Allentown and yet has only one day-time AM radio station. Bethlehem must look to the Allentown stations for some local service.

The city of Allentown has a population of 107,000 contrasted with Easton's 36,000 population (R. 163). The rate of growth for Allentown is 10.2% and but 6% for Easton. Respondent's station would make service available day-time to 314,000 as contrasted with 212,000 for Easton Company and at night-time the difference is 92,000 for Respondent and 57,000 for Easton Company (R. 182, 185). Assuming a grant of either station the population per-local-AM-station is 27,000 for Allentown and 18,000 for Easton (R. 163, 188, 191).

The above comparison of typical Section 307(b) factors is persuasive in supporting a grant of Respondent's station. These factors, considered most favorably to Easton, do not

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* Not applied for at the date of decision. (R. 191).

compel a grant to it of the contested station. If anything, this case is one in which Section 307(b) factors, if not definitely in favor of Allentown, are at least in balance.

The proposal of two-AM-stations-in-each-community is unprecedented. The court below characterized it as a "gloss" on Section 307(b), without passing upon its merits. There is no indication of any congressional policy favoring the duplication of AM stations in a small community. The proposition as here advanced is traced to one prior decision. *Northwestern Ohio Broadcasting Corp.*, 3 R.R. 1945, aff'd per curiam, *Sky Way Broadcasting Corp.* v. *FCC*, 176 F. 2d 951. As the decision below correctly indicated, the *Northwestern* case is clearly distinguishable from the present situation. The competing applicants for the assignment to Lima or Columbus were accorded a full comparative consideration; the findings disclosed no significant differences between the applicants or their service proposals; no other significant factors were present; and it was not contended that the choice of local AM service was an independently controlling factor (R. 317).*

The proposition of giving an arbitrary preference to a one-AM-station community does not appear in any FCC Annual Report or in any other FCC decision. The rules

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* The only other Commission cases cited by Petitioner as authority for the "choice of local service" doctrine (Brief, p. 41, n. 16) are no more controlling in the present case than the *Northwestern Ohio* decision. In *Lake Huron Broadcasting Corporation*, 6 R.R. 1185, an application for a new broadcast station was granted in preference to the mutually exclusive application for improvement of the facilities of an existing station which was found by the Commission to be fatally defective because of engineering considerations. The Commission noted that "since the application of Lake Huron . . . must be denied for engineering considerations, it is not necessary to make a comparative consideration of it with that of [the other applicant]." Similarly, the Commission's decision in *Vermilion Broadcasting Corporation*, 7 R.R. 602(b) involved a single application for a new station designated for hearing on issues of interference to other stations, and not a full scale comparison of competing applicants for new facilities. Neither of the foregoing decisions was reviewed by the court below.

of the Commission contain no preference to this effect.* The hearing issues specified in the case at bar called for a determination on comparative considerations without any suggestion that Easton was to be given an arbitrary preference by reason of having but one AM station. At the time of the original decision in this case, June 1947, which granted the application of Respondent, Easton did not have a second AM station. No mention was made of any idea of preferring Easton for a second station over the assignment of a third station to Allentown.

The Commission's present insistence on an artificial extension of Section 307(b) to prefer a second station in a community is in striking contrast with its administration at the time of the last Congressional amendment. The existing provision was approved June 5, 1936. It was considered by the Commission in its divided decision of October 20, 1936, *In re Wichita Falls Broadcasting Company*, 3 F.C.C. 386. In this case, the Commission authorized the removal of radio station KGKO from Wichita Falls, Texas, to Fort Worth. This removal deprived Wichita Falls, 44,000 population, of its only radio station and the action was formally protested by public service organizations in Wichita Falls and surrounding communities. Fort Worth then had three stations and received good service from others.

The Commission in its decision of February 2, 1937, *In re Petersburg Broadcasting Company*, 3 F.C.C. 666, allowed station WPHR to move from Petersburg, Virginia, to Richmond, thereby depriving Petersburg, 29,000 population, of its only local radio station. The action resulted in giving Richmond four radio stations.

In *Head-of-the-Lakes Broadcasting Co.* v. *FCC*, 84 F.

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* Such a rule was invalidated in *Storer Broadcasting Co.* v. *U. S.*, — F. 2d —, 11 R.R. 2053 (1955), where the court below held the Commission's "multiple ownership" rule abridged the statutory hearing right by arbitrarily rendering an applicant with interest in 5 VHF television stations ineligible for a sixth, without granting comparative consideration to his application.

2d 396, the court below affirmed a 1934 decision of the Commission permitting radio station KGFK to move from Moorhead, Minnesota, to Duluth over the formal protest of the City of Moorhead and leaving that city with no local radio station.

A more recent decision in this vein was rendered by the Commission in December, 1950, *Atlantic Broadcasting Company*, 6 R.R. 1104. This case involved an application for the removal of station WHOM from Jersey City, New Jersey, to New York City. The initial decision recommended a denial of the application since WHOM was Jersey City's only standard broadcast station and a grant would deprive that community of 300,000 of its only local service, 5 R.R. 512. The Commission reversed its trial examiner, thus permitting the elimination of all local AM service from Jersey City.

The Commission's insistence in this case of giving a second AM station to Easton which presently has four local broadcasting facilities can not be justified in the light of these prior actions under the same statute depriving Wichita Falls, Petersburg, Moorhead and Jersey City of any local AM radio service.

II.

THE COURT BELOW PROPERLY CONCLUDED THAT THE COMMISSION'S DECISION WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE ON VITAL COMPARATIVE CONSIDERATIONS

Where only one of two applications may be granted, the Commission must decide which will better serve the public interest. Such a determination requires a hearing and findings in respect to every difference "except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective," and a final decision based "upon a composite consideration of the findings as to the several differences pro and con each applicant." *Johnston Broad-*

casting Co. v. *F.C.C.*, 175 F.2d 351, 357. The hearing is, of course, an adversary proceeding. *Ibid.*

Where the mutually exclusive applications are for operation in different communities, the determination may become more difficult, for a comparison of the communities must also be made; but it is nonetheless necessary. This was emphasized by the court below in its remand of the first decision "for findings upon the *comparative needs* of the two communities . . . and the *relative abilities* of the applicants to serve the greater need." (*Easton Publishing Co.* v. *F.C.C.*, 175 F.2d 344, 351) (emphasis added). It was apparently recognized by the Commission itself when the applications were designated for a second hearing to determine, *inter alia*, "on a comparative basis the relative ability of [Respondent] on the one hand, or [Easton Company] . . . on the other, to meet the greater need . . ." (R. 58). In accordance with the hearing order and the terms of the remand, both the initial decision and the final decision by the Commission overturning it purported to make a number of comparative evaluations of the applicants—despite the Commission's assertion before this court (Petitioner's Brief, p. 47) that all such comparative considerations became a work of supererogation after the Commission's conclusion that the "choice-of-local-service" doctrine controlled. Whether we consider the Commission's position at time of hearing (that it took account of comparative considerations but found no telling difference between the applicants) or its position before this court (that it did not have to take account of comparative considerations at all), the decision of the agency in either case is equally erroneous. For if the Commission had considered fully and given proper weight to the relevant comparative considerations which the evidence warrants, a preference of the Easton Company over Respondent would be untenable.

A brief summary of the major comparative considerations either ignored or slighted by the Commission, and their significance in this proceeding, is appropriate at this point. Such a summary supports fully the determination

of the court below that a remand is necessary because "there is no substantial evidence in the record as a whole . . . to support the essential underlying conclusion that the ability of the applicants to serve their respective communities was about equal" (R. 317-18).

A. Monopoly and Concentration of Control of Mass Media

The evidence of record in this proceeding demonstrates beyond peradventure that a grant of Easton Company's application would result in significant concentration of control by one organization over the media of communications in the city of Easton and would probably be used to further strengthen the monopolistic position now enjoyed there in the dissemination of news and information by the Easton Company; whereas a grant of respondent's application would just as certainly promote competition in radio services in the city of Allentown.

Easton Company is the owner and publisher of the *Easton Daily Express*, the city's only* newspaper (R. 278). It is the licensee of FM broadcast station WEEX, which has a plant valued at $136,000 (R. 281), and has been in operation since February 1948 (R. 91). In December 1952, six months before the decision here under review, Easton Company was granted an authorization for Easton's only television station, WGLV-TV (R. 165), which has been in operation since June 26, 1953. Thus Easton Company has exclusive local control at the present time of the dissemination of news and information in Easton by press and by television and seeks to augment these holdings by a standard broadcast station. Its only competitor is in the radio field, stations WEST and WEST-FM.

Moreover, the record is eloquent on the manner in which the Easton Company has used its dominant news-gathering

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* Easton Company bought out its only competitor in the newspaper field, the *Easton Free Express*, in 1926 at a cost of $300,000 now carried on its books as goodwill (R. 280, 165). Another competitor, the *Morning Free Press*, began publication in Easton in 1940 but was required to suspend operations in 1943 (R. 170).

and advertising position to suppress competition in the Easton community. It is undisputed that the *Easton Express* for a period of twelve years refused to print the radio program logs of Easton's only radio station, WEST, although at the same time the paper carried the logs of New York City stations (R. 171). This practice was continued by the Easton Company until February 1948, when it became for the first time a licensee of the Commission. The practice was abandoned scarcely one month after the release (January 10, 1948) of the Commission's proposed decision in the *Mansfield Journal** case, which found a newspaper applicant unfit to be a licensee because of certain monopolistic practices it had pursued, including just such a discrimination against the only local radio station as that practiced for years by the *Easton Express*.

In addition to its refusal to carry the program logs of its only local competitor in the field of mass media of communication, the record discloses (R. 171) other instances of abuse of its dominant position in the community by the *Easton Express*:

> "The call letters of WEST have not been mentioned by the paper in connection with some charity campaigns in which the station participated, employees of the stations have not been identified as such in some instances when their name has appeared in the Express, and a newspaper in a neighboring city printed an editorial commenting adversely on certain news-gathering practices of the Easton Express."**

In striking contrast to the concentration of mass media displayed by the Easton Company is the fact that Respond-

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* 3 R.R. 2014(a) (1948), affirmed, *Mansfield Journal* v. *F.C.C.*, 180 F. 2d 28. *See Lorain Journal Co.* v. *United States*, 342 U.S. 143.

** The last mentioned instance above refers to a 1949 editorial published in the *Phillipsburger* in the neighboring city of Phillipsburg, New Jersey, alleging that the Easton Company with regard to public and civic leaders of Phillipsburg followed a policy of "no scoop, no news" (R. 293-294).

ent has no activity in Allentown other than the operation of radio station WHOL, and that there are three other standard broadcast stations in the same community with which Respondent is in active competition.

Even in the absence of any evidence that the Easton Company had utilized the multiple communication facilities it controls in Easton to suppress competition from other sources, the mere fact of its present ownership of a newspaper and two broadcasting facilities in Easton would militate strongly against a grant to it over Respondent. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 189 F. 2d 677; see *Stahlman* v. *F.C.C.*, 126 F. 2d 124. In the *Scripps-Howard* case, the Commission, in choosing between mutually exclusive applications for a new standard broadcast station at Cleveland, Ohio, decided against the applicant which owned a daily newspaper in that city (one of three), and in favor of the applicant with no other interests in mass communications in the area, even in the absence of any evidence in the record of monopolistic or unfair practices by the newspaper applicant. The court below in affirming the decision stated (189 F. 2d at 683):

> "In considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communication in the area affected . . . This is not to say a permit should be withheld from an applicant because it is otherwise engaged in the dissemination of news . . . But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity."*

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* Cf. *Associated Press* v. *United States*, 326 U.S. 1, 20, where this court agreed that the public interest is served by "the widest possible dissemination of information from diverse and antagonistic sources."

Under the above policy the comparative significance against Easton Company would be great even in the absence of any showing of improper practices. But the record contains undisputed evidence of abuse of its position in the community by the Easton Company to suppress competition from other sources of information. Where a comparison is necessary and a choice possible, any evidence of monopolistic activity by an applicant already enjoying a concentration of mass media in the community involved must weigh heavily against his bid for new facilities.* The great significance of the foregoing factors in the light of Commission and court decisions, independent of all other questions in this case, justify the remand below for an evaluation of the monopoly and concentration of control question which, as the Court below correctly observed, upon re-examination "may well assume a different and perhaps decisive importance." (R. 322).

B. Uncertainty of Program Proposals

In any comparative hearing before the Commission, the applicants have a paramount obligation to make a full and definite disclosure of their intentions as to the nature and quality of the programs which they will broadcast over the requested facilities, for "in a comparative proceeding, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 351, 359. The record before the Commission in this proceeding showed the Easton Company to be in default

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* See *Radio Fort Wayne, Inc.*, 9 R.R. 1221, in which the Commission reversed a trial examiner's report favoring an applicant who controlled a merged newspaper which employed joint advertising rates. The Commission noted that it did "not care to assume the risks attendant upon preferring an applicant involved in practices which, if carried over into the broadcast field, would raise serious public interest question[s]." 9 R.R. at 1222m.

on a major part of its program proposal as a result of unconvincing and conflicting testimony on possible network affiliation, and to have made an unsatisfactory or incomplete showing in other areas of program planning. Even disregarding the examiner's wholly warranted conclusion that the lack of credibility of certain testimony by Easton principals cast doubt on large areas of the evidence adduced, and taking this evidence at face value, the program proposal advanced by Easton is lacking in merit as compared with that advanced by Respondent when judged against the existing radio services and the broadcast needs of the respective communities involved. The trial examiner's report contains three pages of findings comparing Easton Company's proposed service with that now being rendered by Easton's station WEST (R. 105-107). Her conclusions from this evidence are summarized as follows:

> "A comparison of the proposed program service of the Easton applicant with that of Station WEST (paragraph 128 of the findings) discloses that a substantial portion of the local public service programs, such as panel discussions, interviews, broadcasts of church services and other devotional programs, farm programs, Parent-Teachers Association programs, weather reports, service club luncheon speakers, women's programs, veterans programs and news programs proposed by the Easton applicant are very similar to programs already carried by Station WEST." (R. 135-36)

A similar comparison of Respondent's radio service proposal with the existing radio services available from the three other Allentown stations, WSAN, WAEB, and WKAP, is also contained in the initial decision (R. 108-22). This evidence shows that a striking number of public service, educational and religious programs are broadcast exclusively by Respondent's station, WHOL. For example, WHOL is the only station which now furnishes facilities to the Ministers League (R. 117). The evidence demonstrates that respondent's radio service enjoys wide-spread

public support of leading persons in the community (R. 265-277). The trial examiner's report contains detailed evidentiary findings on "local existing service in Allentown from the three other stations" (R. 78-88), but concludes that Respondent "proposes a program service which is geared to the needs and interests of the community it would serve and includes many local programs not otherwise available to the community, . . . Almost 60% of its total broadcast time during the sample week of January 14, 1951 was devoted to programs of a type not being carried simultaneously by any other standard broadcast station in either Allentown or Bethlehem . . . The station has also carried many local public service programs which were not broadcast by any other station in the area at any time."

The foregoing findings indicate the clear superiority of Respondent's radio service proposal, compared with existing radio services in Allentown, over Easton Company's radio service proposal compared with existing radio service in Easton. Their import, however, is dismissed in the Commission's decision with the following curt acknowledgment of Respondent's superiority:

Respondent (WHOL)	Easton Company
"The station carries a wide variety of network programs, and numerous local programs other than those mentioned, including some of a type not carried by other local stations. Many of the station's programs are of a type not being broadcast at the same time by any other local station." (R. 203)	"Many of the local programs proposed to be broadcast by the Easton applicant are similar in a general way to programs now broadcast by Station WEST." (R. 199)

This demonstrated superiority in definiteness and quality of program proposals is an essential element of comparison between rival applicants before the Commission which cannot be slighted or minimized by that agency consistent

with its requirements of a fair hearing on all issues raised by the parties. Commission decisions between competing applicants have frequently turned on a comparison of the program proposals,* and this preference has been upheld on review by the court below.**

The *Plains Radio* case involved a contest between two mutually exclusive applicants for the same radio station assignment at Lubbock, Texas. The applicant favored by the Commission had proposed program service predicated upon a Mutual Broadcasting System affiliation. By the time the case was reviewed by the Commission that network had contracted with another station in Lubbock. This left the major portion of the program evidence of the favored applicant impossible of performance. The court reversed the Commission and with respect to this issue stated (175 F. 2d at 362):

> ". . . that in a comparative determination the relative merits of program proposals are an important, if not vital, feature of measurement in the public interest.
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> * * *
>
> "We are not told by any findings what type of program Lubbock proposes, absent the Mutual network affiliation. Moreover, this is a comparative consideration, and the question is not whether the applicant will present a well-rounded program but whether its proposals will better serve the public interest than will those of another applicant. How can a conclusion be reached as to which proposal is better, if the nature of one of them is not known?

The Easton Company on this record failed to meet the burden of proof imposed by statute, Sec. 309(b), and its showing is otherwise deficient within the rule of *Power*

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* *Missouri Broadcasting Corp.*, 3 F.C.C. 349; *Rossmoyne Corp.*, 7 R.R. 117; *Tribune Co.*, 9 R.R. 719.

** *Plains Radio Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 359; see *Kentucky Broadcasting Co.* v. *F.C.C.*, 174 F. 2d 38; *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 351.

City Broadcasting Corp. 4 F.C.C. 227, 230 in which the Commission stated:

> "From an analysis of the entire record, we are of the opinion, and so find, that the applicant's plans for operating the proposed station are not sufficient to enable the Commission, with any reasonable degree of definiteness, to ascertain the nature and character of the service which may be expected in the event this application were granted."

C. Past Performance and Representations to the Commission

The Commission has repeatedly held that a high index to the future reliability of applicants for new facilities may be found in the fidelity with which those applicants have adhered to prior representations to the Commission.* In the second hearing in the present proceeding, the radio service to the city of Allentown by WHOL was reviewed critically and in detail without revealing the slightest deviation by Respondent in actual performance from the representations made by it to the Commission at the time of the original application and hearing in 1946. In the case of the Easton Company, however, the record established numerous departures from its 1946 representations to the Commission in the actual program services now being rendered by its FM station, WEEX (R. 89, 95-97). Moreover, as more fully discussed below, the principals of the Easton Company appearing at the second hearing treated their earlier representations to the Commission with what may only be termed indifference. As indicated elsewhere, the examiner found (and the court below agreed) that the Easton Company changed its testimony on its plans for network affiliation between the first and the second hearing, and then impeached its new representation upon cross-examination. An Easton Company witness referred to his applicant's representations to the

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* *Unity Corp.*, 7 R.R. 1302; *Aladdin Radio & Television, Inc.*, 9 R.R. 1; see *KFKB Broadcasting Ass'n* v. *F.R.C.*, 47 F. 2d. 670.

Commission at the first hearing that a Citizens' Advisory Committee would be formed to assist in the planning of programs as "obviously silly" (R. 288). The Easton Company's testimony in the second hearing on other matters was brought into question because of the evasive and uncandid attitude of that applicant's witnesses. This cavalier disregard of earlier representations to the Commission by Easton Company serves to confirm the examiner's reservations, based on her observation of the witnesses before her, as to the sincerity of the representations at the second hearing. In a comparative proceeding the departures from *past* representations by the Easton Company should have counted against it according to Commission and court precedent even in the absence of questions as to credibility.* When these departures from past promises are coupled with evasive and uncandid conduct regarding *future* operations, the comparison to an applicant with no such defects becomes all the more significant. *Cf. F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223.

D. Other Public Interest Considerations

The court below discussed the three areas of comparative consideration above as illustrative of the insufficiency of the evidence on which the Commission's findings rested. These, however, are not the only areas in which the Commission's decision is wanting, for the record indicates at least the following additional significant differences between the two proposals which were not given weight by the agency:

A grant of Easton Company's application would in fact be an addition to its existing FM broadcasting and television plant; whereas, a grant to Respondent would result in an entirely *new* service not otherwise available over any other facility. For example, Respondent's station employs fourteen persons (R. 180); whereas, Easton Company would given employment to only four additional em-

* Note, *supra*, p. 42.

ployees (R. 169). Easton Company's program service would be duplicated over its FM station and the proposed AM station (R. 137). Thus programs which Easton Company proposes to broadcast can now be broadcast over its existing FM and television stations.

Respondent's proposal has the support of testimony of leading civic, educational and religious leaders of Allentown; whereas, no such support is shown for the Easton Company's proposal. Public witnesses testifying for Respondent include Mayor Donald V. Hock, Rabbi Louis M. Youngerman, Rev. Reuben D. Bollmann, Rev. Charles L. Miller, Prof. Wilbur William Hollman, Cedar Crest College, and Rev. Willis D. Mathias, President, Ministers League of Allentown (R. 265-78). In contrast, no financially disinterested public witnesses in Easton testified for the Easton Company with one minor exception. Lawrence L. Mason ostensibly appeared in that capacity as President of Easton Players Guild but it was later developed on cross-examination of another Easton Company witness that Mr. Mason was in the employ of the Easton Company (R. 102, 289). Ralph C. Hutchinson testified as President of Lafayette College which was shown to be a beneficiary of one of the Easton Company trusts (R. 101, 168). C. Hammond Blatchford of Centenary Junior College, Hackettstown, New Jersey, testified but it was established that this city is not within a service area of the proposed Easton Company station and that his College does use the facilities of existing station WEST (R. 100). The only other public witness was William R. Nixon, Chairman, Committee of Music Appreciation Program for Elementary Schools, who testified that the AM station would give expanded "receiver-coverage," that the existing FM station provided a better form of reception and that he had made no efforts to use the services of existing station WEST (R. 102).

The final decision of the Commission here under review considerations outlined in the foregoing paragraphs or is either silent as to the significance of the comparative

dismisses them out of hand as subordinate to the overweening effect of the "choice-of-local-service" doctrine which the Commission seeks to engraft upon Section 307(b) of the Act.

The failure to consider the important public interest questions raised and answered by a consideration of monopoly, program proposals, and applicant reliability before the Commission fully justifies the holding of the court below that the record as a whole contains no substantial evidence to support the only kind of finding which could bring Section 307(b) into play as a crucial factor. A review of the above discussed factors of comparative consideration is sufficient to show fair observance of the substantial evidence rule by the lower court and the presence in this case of no recognized exception. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491; *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502.

III.

THE COMMISSION ACTED ERRONEOUSLY IN REJECTING THE FINDINGS OF ITS TRIAL EXAMINER ON THE LACK OF CREDIBILITY OF TESTIMONIAL EVIDENCE OF EASTON COMPANY WITNESSES

This question concerns the testimony of the two principal witnesses of the Easton Company, the findings of the trial examiner thereon, and the rejection of these findings by the Commission. The witnesses involved are J. L. Stackhouse, the President, Treasurer, and "general manager" of the Easton Company, one of its three directors and a stockholder (1.8%), (R. 167), and Nelson S. Rounsley, an employee of the Easton Company and "general manager" of its radio station activities (R. 89, 170).

A. The Disputed Credibility Evidence and Rulings Thereon

As noted above, evidence on program planning is an essential element in FCC actions on applications for new broadcast stations. The FCC application form, which must be submitted under oath, calls for complete program data in the form of a proposed typical week's schedule with

program type classifications for each quarter hour, including network programs, 1 R.R. 98: 111-114. FCC rules require "full and complete disclosures" (47 CFR 1.305) and reliance is based on an applicant's representations.*

In the case at bar, evidence on program planning was of unique significance since the point of remand was for further findings on program service.** One issue set down by the FCC in its second hearing order called for a determination of the "program service presently being rendered" compared with the service plans proposed by Respondent and Easton (R. 45).

Easton Company's program evidence was given by Mr. Rounsley and his entire testimony was on programming which was further detailed in four exhibits totaling 38 pages.

Exhibit No. 84 of Easton Company entitled "Proposed Program Schedule for Typical Week" listed the programs to be broadcast each quarter hour from 7:00 A.M. to midnight, all given as locally originated, Under "Program Sources" the answer to "network commercial" and "network sustaining" in each case was "NONE". Such detailing of program scheduling necessarily requires a disclosure of intentions as to network affiliation.***

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* An applicant's responses to program questions in FCC forms "constitute a representation of programming policy upon which the Commission will rely in considering the application." 1 R.R. 98:111.

** This is the only case in which two applicants were required to prove the detail of program services, hour-by-hour, day-by-day, being rendered by the existing stations. Such proof has never been required before or since. Program content or character of service are *not* within the context of Sec. 307(b).

*** The intentions of an applicant on the question of network affiliation admits of one of three possibilities. The fact and representations may be that (a) all services will be locally originated, (b) network services will be employed (which may vary from definite commitments to expectations), (c) the applicant is frankly uncertain in which case his direct evidence may be given in the alternative, one schedule based on local programming and the other predicated upon network affiliation. See, *e.g.*, *Aladdin Radio & Television, Inc.*, 9 R.R. 1; *Oregon Television, Inc.*, 9 R.R. 1401; *Petersburg Television Corporation*, 10 R.R. 567.

The Nelson S. Rounsley Testimony. This witness under cross-examination contradicted testimony which he gave under direct examination that network programs were not to be included in the proposed radio service. The precise testimony given was as follows (R. 288):

> Mr. Lovett: "I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule."
> Mr. Rounsley: "That is correct."
> Mr. Lovett: "That is your present plan, is it?"
> Mr. Rounsley: "That is the present plan."

The above testimony was reaffirmed upon questioning by public counsel (R. 289):

> Mr. Schildhause: "Mr. Rounsley, you stated, did you not, that you had no current plans to affiliate your proposed AM station with the network?"
> Mr. Rounsley: "That is correct."

The testimony on network affiliation would probably have ended at this point except for a chance remark by the witness later on and on a different subject, religious programs. The witness was asked if it would be a firm policy not to charge for religious programs. The following answer and qualification were given (R. 289-90):

> Mr. Rounsley: "That will be a firm policy. I better qualify that. In the event of any network affiliation, any programs accepted by the network as commercial any religious programs, may or may not be accepted by the stations as commercial."

This was the first indication that the witness had in mind any network affiliation. The witness then passed it off as a "remote possibility". Next, on being pressed by public counsel, the witness further modified his testimony that if a network were offered, it would be considered. At this point the Presiding Officer stated (R. 290):

> "Mr. Rounsley, I am a little confused about this network proposition."

The witness then responded that if the station were granted to the Easton Company it would " . . . explore the possibility of network affiliation". Then the following exchange took place between the Presiding Officer and Mr. Rounsley:

> The Presiding Officer: "Am I to understand you would not wait for somebody to come to you?"
> The Witness: "That is correct. In other words, we would have to have something to affiliate before we talk business."
> The Presiding Officer: "It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?"
> The Witness: "I think we would probably see what was available; . . ."

It is impossible, of course, to recreate by any words here in print the scene in the hearing room, the appearance of the witness, the emotions displayed by him, the tone of his voice, or the sum of impressions gleaned from what the trial examiner saw, heard and experienced during the above exchange of questions and answers.* There can be no serious doubt, however, that after his self-impeachment the trial examiner no longer placed credence in the testimony given by this witness. The trial examiner was clearly entitled to regard the testimony of this witness as untrustworthy. The responsibility which long experience vests in one who presides at the taking of evidence entitled the trial examiner to conclude that the Easton Company's real intentions were to seek actively a network affiliation notwithstanding the direct evidence to the contrary that there was no such intention.

The above episode is of two-fold significance. The matter of self-impeachment is significant of itself. Of equal significance is the contradiction or unanswered doubt on the record as to what program service was actually proposed by the Easton Company, thus leaving that applicant in default on its burden of presenting evidence on its pro-

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* The trial examiner on this episode reports ". . . he displayed an attitude of evasiveness and lack of candor . . . " (R. 143).

posal for radio service.* This second aspect has been discussed above.

The J. L. Stackhouse Testimony. This witness, the chief corporate official to testify for the Easton Company, showed a marked capacity for detail and recollection on direct examination and an inconvenient lack of these abilities on cross-examination. The matters in dispute, although not of themselves too significant, did include facts bearing on the dominance of the Easton Company over mass media facilities in Easton. Of perhaps equal significance is the fact that this corporate official gave no testimony on the critical issue of the program plans of the Easton Company nor was he recalled as a witness to correct the contradictions in the testimony given by Mr. Rounsley on the Easton Company's program proposal.

The witness on direct examination testified as to newspapers circulated in the Easton area. The obvious purpose of volunteering this line of testimony was to show some competition to the Easton Daily Express, Easton's only newspaper. The testimony was that daily newspapers published in some five other cities and those published in Philadelphia and New York circulated in the Easton area. The witness also testified that there were some eight weekly publications of surrounding communities circulated in the Easton area. When pressed on cross-examination as to each daily publication, the witness was unable to give any circulation in Easton or in the Easton city zone except the three newspapers published in Bethlehem and Allentown. As to the several weekly publications, the witness first denied having circulation figures. When asked if they were small, he immediately gave the approximate circulation of each (R. 179). However, no circulation was given for Easton. The witness concluded this line of testimony by denying that he had any intention of implying on direct

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* The act provides that the burden of proceeding and the burden of proof upon all issues shall be upon the appellant. Sec. 309(b).

examination that any of the weeklies circulated in Easton (R. 278-284).

This witness was asked by public counsel whether the Easton Company declared a dividend last year (1950). The answer was "yes". An objection by counsel for the Easton Company to a further question on the size of the dividend was overruled. The witness next parried:

"Are you speaking of 1950? You said last year, I believe?" Public counsel repeated the question:

"For the year 1950, what were the dividends?" The witness answered:

"I don't have the figures here."

Again he was asked the size of the dividend per share but answered:

"I don't know that without checking the record."

This testimony was concluded by an exchange between the trial examiner and the witness as follows (R. 285-287):

> The Presiding Officer: "In answer to a question by Commission counsel I understood you to say that you did not know the amount of dividends that were paid, and my only question to you now is, am I correct in assuming that you do not know what dividends you received from the stock which you own in the Easton Publishing Company, last year?"
>
> The Witness: "No; I do know that, I mean my records show it, but I do not know it as of this moment."

This testimony is susceptible of one of two possible interpretations, i.e., (a) the witness did not in fact know the amount of the dividend; or (b) the witness did know this fact. If the witness was untruthful in disclaiming recollection this may have been motivated by one of two causes, i.e., (a) the witness may have considered the amount of the dividend none of the Commission's business, not something to make public, or (b) the witness may have decided to parry the question pending some explanation of his counsel's objection to it. In any event no "post mortem" speculation on the cold record is likely to be more accurate

than the appraisal of the trial examiner, who was clearly unimpressed by the testimony of this witness.

A hearing officer, who lives with a case, has an unique advantage for appraising the probity of oral testimony in the light of associated circumstances. For example, among the four corporate offices held by Mr. Stackhouse was that of Treasurer. He is a 2% stockholder of the corporation, 65% of the stock of which is owned by three trusts (R. 208). It is not likely that the annual dividend record of this 1.7 million dollar publishing and radio enterprise is a matter of indifference to either the three trustees or to Mr. Stackhouse or that his memory would need refreshing on the 1950 dividend distribution, in part to himself, of the net profit in excess of $50,000 for the year (R. 165). As the trial examiner stated, " . . . acts of evasiveness may be more significant than the facts evaded" (R. 145).* The significance of the J. L. Stackhouse testimony in dispute is that there should exist any episode of his testimony or demeanor giving rise to any question as to the trustworthiness of the representations and disclosures to the FCC by Easton Company's chief corporate officer. It is appropriate also that the above testimony in dispute be evaluated by association with other evidentiary circumstances.

It must be conceded that neither J. L. Stackhouse nor Nelson S. Rounsley may be regarded as disinterested witnesses.

Besides interest there is also motivation. Mr. Stackhouse was moved to play down the Easton Company's exclusive position as publisher of Easton's only newspaper, by attempting to show competing circulation from outside publications. Easton Company sought to gain a preferential position in the case by emphasizing locally originated radio programs to the exclusion of network programming. The Commission has expressed itself on this subject as follows (1 R.R. 53:135):

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* See *F.C.C.* v. *WOKO*, 329 U.S. 223, 227.

> "The Commission has always placed a marked emphasis and in some cases perhaps an undue emphasis on the carrying of local live programs as a standard of public interest."

Easton Company in the 1946 hearing unequivocally proposed network programming (R. 21, 61, 89, 90, 103). Preceding the second hearing, Easton Company refused to accede to the Commission's behest that the 1945 applications of the parties be amended and brought up to date. Except for formal corporate changes not material, Easton Company did not amend its pleadings on program service. The effect was to allow it complete freedom to tailor its direct evidence on program service at the second hearing. Easton Company's testimony on direct represented local program service only. No attempt was made to reconcile this with its testimony in the 1946 hearing on network affiliation (R. 103):

> "The program schedule proposed at the 1951 hearing contains no network programs and no mention of the network affiliation question was made on direct examination".

Mr. Rounsley also changed his testimony between 1946 and 1951 on another program subject. His testimony in 1946 was that (R. 21, 90):

> "Applicant has organized a citizens' advisory committee to assist it in developing a well-rounded program service adapted to the needs and desires of the community".

The same witness in his 1951 testimony characterized the 1946 testimony on a citizens' advisory committee as "obviously silly" (R. 288, 105).

The trial examiner's findings contain a detailed comparison between the program service representations made by Easton Company in its proposal for FM radio station WEEX with the actual programs being broadcast by that station in 1951. Numerous differences between the 1946

representations and the actual programming are enumerated in findings 120 and 121 of the Initial Decision (R. 95-98). This is associated with the finding on demeanor evidence as to witness Rounsley that " . . . he displayed an attitude of evasiveness and lack of candor on the subject" (R. 143). These conclusions were related back to the evidentiary findings in par. 126 (R. 102-104).

The Trial Examiner's Findings. The trial examiner concluded that the Easton Company had failed to make "frank, candid and honest disclosures to the Commission" and that its principal witnesses were reluctant and evasive (R. 144). The ground of the trial examiner's recommended denial of the Easton Company's application was that it had defaulted on its burden of making a satisfactory showing of its proposed program service; and, that this testimony was untrustworthy and could not be relied upon with confidence as to the character of radio service which would actually be rendered by the Easton Company (R. 146).

Commission's Ruling on Credibility Evidence. The Commission, on review of the Initial Decision, "rejected" the above stated findings and conclusions of the trial examiner. (R. 214). The reason given by the Commission is "we do not agree." The Commission sought to overcome the force of these findings by an independent evaluation of the *disputed evidence. This was undertaken because (a) of* "the seriousness of the matter" and (b) the hearing officer's judgment as to credibility was not based on the testimony of "different witnesses who make contradictory statements" (R. 205). (This ruling ignored the existence of an issue of credibility based on self-impeachment). The detail of the Commission's independent evaluation is left quite unexplained except that it flatly "rejected the conclusion of the Hearing Examiner" and disagreed "that the applicant has been evasive or uncandid about its network affiliation plans." The trial examiner's findings above stated are solidly supported by substantial evidence and in keeping with permissible demeanor considerations. The Commission arbitrarily ignored these findings. Without

any reasoned judgment, the Commission says "we disagree"—"we reject" (R. 214).

B. The Trial Examiner's Findings on Credibility Were Improperly Rejected

No one would seriously contend at this period in the evolution of administrative law that a trial examiner of an agency should be disabled from making findings on credibility. The question is what effect shall be given to such findings, i.e., by the agency, and on appellate review. Two possible extremes are: (a) the trial examiner's findings on credibility are as unassailable as those of a jury; or, (b) the agency at will may disregard the trial examiner's findings on credibility and substitute its own judgment.

This issue* is one of first impression in the judicial review of radio appeal cases. Also a consideration of the role of the FCC relative to its trial examiners is one of first impression under the McFarland Act, *infra*, which makes the FCC in this matter unique among Federal agencies.

Credibility is a part of the rule of confrontation. From the earliest days, our concept of adjudication has accepted the principal of confrontation, requiring the appearance of witnesses, oral testimony under oath and the right of cross-examination. This was the main difference between the civil-law and the common-law systems on taking evidence. III Wigmore, *Evidence* § 946 (1940 ed.). One purpose of having the witness in person before the tribunal is " . . . so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom". V Wigmore, *Evidence*, § 1399 (1940 ed.). Thus wherever oral testimony is required, "the demeanor of a witness is always assumed to be in evidence". *The William J. Riddle*, 102 F. Supp. 884, 887, (S.D.N.Y. 1952).

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* The credibility issue in this case is independent of the question of monopoly and undue concentration of control over communications media.

The right of confrontation is an essential part of the structure of a hearing since it embraces opportunity for cross-examination and demeanor evidence. In any situation where oral testimony is permitted or required, our hearing process accepts the right of cross-examination and a testing of the credibility of the witness not only by what is said, but also by what is seen and heard. These features are deemed essential for the "taking of evidence".

As between a court and jury, credibility is determined by the jury.* Its findings of fact, with possible exceptions not material here, are characterized as unassailable.

As between a judge and a master, the master's finding of fact are entitled to acceptance unless "clearly erroneous", Rule 53(e)(2), F.R.C.P. But a distinction is made as to findings on *credibility*. The findings of a master on credibility are entitled to even greater weight, variously stated as "great weight", "presumptively correct" and of "controlling weight". In *Ferroline Corp.* v. *General Aniline and Film Corp.*, 207 F. 2d 912, 920 (7th Cir. 1953) the court said:

> "Even where, as here, the oral testimony is largely uncontradicted, the trial court must respect the advantage the master enjoyed when he saw and heard the witnesses and was thus enabled to judge of their veracity and credibility. Santa Cruz Oil Corp. v. Allbright-Nell Co., 7 Cir., 115 F. 2d 604."

In *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (7th Cir. 1940) the court, although affirming the district court's modification of the master's findings, acknowledged:

> "Where the question is one of veracity it is clear that the appellate court should give controlling weight to the trier of fact who saw and heard the witnesses. This is well established."

In *General Kintrolar Co.* v. *Allen*, 124 F. 2d 123 (6th Cir. 1941), the district court was reversed on a burden of proof

* 53 Am. Jur. *Trial*, § 181.

ruling for differing with the findings of the master. The court of appeals stated, 124 F. 2d at 124:

> "As to the oral testimony, the master had a superior opportunity to appraise the credibility of the witnesses and to resolve conflicts in their testimony. His findings based thereon are presumptively correct. Commissioners of Sewerage v. Davis, 6 Cir., 88 F. 2d 797, 800."

The "clearly erroneous" doctrine as applied to a master's* finding of fact is the same standard as applied to an appellate court upon review of the findings of fact of the trial judge acting without a jury. Rule 52(a) states, "findings of fact shall not be set aside unless clearly erroneous, * * * ". Additionally, where credibility is involved there is further provided "that due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". It follows that credibility findings predicated upon testimonial evidence are given the same order of finality between the master and the trial court and between a trial court acting without a jury and an appellate court.** *American Tobacco Co.* v. *The Katingo Hadjipetera*, 194 F. 2d 449, cited by the Government, is not in point since the findings rejected on review did not involve credibility findings or "any direct testimony". The opinion in this case recognized the rule of near finality given to a Judge's findings "on facts to which a witness testified orally", 194 F. 2d at 451:

> "We accept, as we must, those of the trial judge's inferences of fact which he drew directly from his

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* Under Rule 53(a) the word "master" is now used to include without distinction "a referee, and auditor, and an examiner."

** 5 Moore's Federal Practice, 2d Ed. 2984: "The problem of reviewing the master's findings of fact is essentially the same as the problem of reviewing the district court's findings of fact when it is the initial trier of the facts . . . Essentially the same distinctions are applied in reviewing the master's findings of fact. Those that are based on oral testimony, where credibility is involved, are entitled to great weight."

> estimates of the credibility of witnesses whom he observed as they testified in his presence—i.e., his inferences (sometimes called "testimonial inferences") that certain facts existed because he believed some witness or witnesses who testified before him that those facts did exist."

The greater finality accorded credibility findings by a trial court as to a master and by an appellate court as to a trial court, was clearly illustrated in *Morris Plan Industrial Bank* v. *Henderson*, 131 F. 2d 975 (2d Cir. 1942), which set aside an order of the district court reversing the findings of the referee. The controversy concerned testimony on the value, if any, of a bankrupt's claim against his brother-in-law and the reason for failing to schedule this asset. The court regarded the case as one involving demeanor evidence "in which the referee's judgment was final". On the question on whether the district court had "larger" latitude in reviewing the referee's findings than that allowed the court of appeals, the opinion states, 131 F. 2d at 976:

> "It is true that logically a distinction can be drawn between holding a referee's finding to be 'clearly erroneous' and holding a judge's finding that a referee's finding is 'clearly erroneous' to be 'clearly erroneous' . . . We should regret, however, to be compelled now to introduce such refinements into the solution of what is after all only a practical problem."

The above cases indicate a long standing recognition of the importance of demeanor evidence and that a judgment on demeanor evidence is an essential responsibility of the trier of facts. The findings of fact whether by a master or by a trial court on credibility evidence are almost conclusive on review in contrast to other findings where there is a greater latitude of rejection. Since demeanor evidence cannot be preserved in a printed record, reason and experience compel that findings thereon by the trier of the facts be accorded great weight. Such restraint is essen-

tial, otherwise the true function of the trial officer will be stultified.

The near finality accorded findings on credibility in judicial proceedings has been applied in almost the same degree to trial examiner's findings on credibility in agency proceedings. The *Universal Camera* case, 340 U.S. 474, 496, recognized that the status of a trial examiner's report before an agency becomes more significant where credibility findings are involved. This significance was given effect on remand by the opinion in *NLRB* v. *Universal Camera Corp.*, 190 F. 2d 429, 430, which stated:

> ". . . on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors, when the words alone leave any rational choice. Perhaps as good a way as any to state the change effected by the amendment is to say that we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."

The words "substantial preponderance in the testimony as recorded" are keyed to credibility findings on demeanor evidence as distinguished from the "substantial evidence doctrine" as applied to findings in general not including credibility. The above opinion by Judge Learned Hand was quoted with approval in the decision here under review (R. 319) on the point of credibility findings. As to other findings not involving demeanor evidence, such as the monopoly issue, the "substantial evidence" rule was applied (R. 317). The effect to be given a trial examiner's findings on credibility was again stated in a later opinion by Judge Learned Hand in *NLRB* v. *James Thompson & Co.*, 208 F. 2d 743, which reversed the agency's decision and reinstated its trial examiner's findings that the employer had acted in good faith in refusing to deal with a union in the belief that it had not obtained a majority representation. The opinion states, 208 F. 2d at 746:

> "Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not

> because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test."

The past decade of judicial review of agency decisions has shown a consistent trend of upholding the findings of a trial examiner on credibility evidence. In *S. Buchsbaum and Co.* v. *FTC*, 153 F. 2d 85 (Cir. 7th, 1946), which was decided even before passage of the Administrative Procedure Act, the court stated, 153 F. 2d at 87:

> "The Commission contends that what it calls the marked difference between the functions and authority of trial judges and masters on the one hand, and trial examiners on the other, precludes the application of the rule of confrontation in the authorities just referred to. Hence it argues that the finding of examiners being advisory only, there is not present in their findings the principal consideration, that is to say, finality of factual judgment, which requires a trial *de novo* in the event of the death or disability of a judge or master. We think this does not meet petitioner's contention. The elementary principle underlying all trials of whatever nature seems to be that the rule of confrontation shall be applied where the witnesses are available for that purpose. . . . Congress has authorized the appointment of Examiners in such cases and they are the eyes and ears of the Commission. There is no complaint as to this delegated power, but it certainly cannot be said that the appointment would free the Examiner from the duty of observing the demeanor of witnesses, for this would amount to a lack of due process to which petitioner is entitled."

A number of decisions reviewing National Labor Relations Board cases have given effect to trial examiner find-

ings on credibility evidence. *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484 (2d Cir. 1952) is a case in which the court upheld the agency's order and this affirmance was in a large measure predicated upon the trial examiner's findings on demeanor evidence. The opinion states, 201 F. 2d at 487-88:

> "If, in similar circumstances, a trial judge made such a finding, we would be obliged to accept it. For the pivotal factor here is the Examiner's disbelief in Holland's testimony, a disbelief that rested on an evaluation of Holland's credibility, which in turn the Examiner founded upon 'his observation of the witnesses.' Repeatedly, the courts have said that, since observation of such 'demeanor evidence' is open to a trier of the facts when witnesses testify orally in his presence, and since such observation is not open to a reviewing tribunal, that fact-trier's findings, to the extent that they comprise direct or 'testimontial' inferences, are ordinarily unreviewable. True, demeanor evidence may sometimes mislead; but our courts regard it nevertheless as an excellent clue to the trustworthiness of testimony.
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> * * *
>
> "The result of the stress on demeanor is to confer immense discretion on those who, in finding facts, rely on oral testimony. But few doubt that the risk involved is, on the whole, well worthwhile."

In a recent decision, *Boeing Airplane Co.* v. *NLRB*, 217 F. 2d 369 (9th Cir. 1955), the agency was reversed on numerous grounds, in most instances for rejecting credibility findings of the trial examiner. In this case the Board discredited testimony which the trial examiner believed and in other instances credited testimony which the trial examiner had disbelieved. The opinion of the court states, 217 F. 2d at 373:

> "The Court has made a careful review of the long record and of the Intermediate Report in the light of the extensive briefs filed here. The Court has only the

highest praise for the careful and discriminating work of the Trial Examiner. His approach was judicial and his judgment exact. The Board should have accepted his findings without additions, exceptions or modifications. He alone saw the witnesses, and his opportunity to appraise the general situation, the feeling of management and employees, together with the imponderables, cannot be paralleled by either this Court or the Board. This Court affirms the findings of the Intermediate Report in their entirety."

Another significant recent decision on examiner credibility findings, not cited in the Government's brief, is *Gamble-Skogmo* v. *FTC*, 211 F. 2d 106 (8th Cir. 1954) which set aside a decision by that agency on the ground that full effect was not given to testimonial evidence at the trial examiner level. In this case, the trial examiner retired before concluding the trial, which was resumed before another trial examiner. The court said that it was a reversible error to substitute a second trial examiner where testimonial evidence was involved before the first trial examiner. The court held that a trial examiner's judgment on credibility of testimony is a functional part of the decisional process and that credibility evaluation can be made only by the trial examiner who had presided at the reception of the evidence. The opinion states, 211 F. 2d at 113:

"In legal concept, appearance and demeanor on the part of orally-testifying witnesses and permeating trial atmosphere to which these incidents may give rise are, in such situations, 'assumed to be in evidence.' Wigmore on Evidence, 3rd ed., § 946. And such an evaluation of credibility, therefore, in relation to oral conflicting testimony, on material matters, necessarily is of the nature and stature of any rationalized conclusion constituting a part of a judicial or quasi-judicial result.

The agency appeal decisions above cited give deference

to credibility findings of a trial examiner essentially comparable to that given a master or a trial judge. Any other rule would eliminate demeanor evidence from agency case proceedings.

The above cases pertain only to credibility findings and, for this reason, are to be distinguished from *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). *Minneapolis-Honeywell* held that the trial examiner's findings out-weighed the facts relied upon by the FTC in reaching an opposite result, and that their rejection by the Commission was therefore arbitrary. This decision did not turn on findings on credibility, and consequently, is not here in point.

Full application of the rule of confrontation at the trial examiner level does not impinge upon proper policy functions of the agency. *Credibility can only deal with a question of fact.* One of the most significant observations contained in the Benjamin Report on *Administrative Adjudication in New York* (1942) is the following:

> *"The Place of Policy in Administrative Adjudication"*
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> * * *
>
> "But policy should play no part in the decision of questions of fact; policy, rightly understood, cannot call for the decision of a question of fact in a particular way."

The FCC procedural rule on hearings, 47 CFR 1.871, provides:

> "§ 1.871 Rules of evidence.—Except as otherwise provided herein, *the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings.* Such rules may be relaxed if the ends of justice will be better served by so doing." (Emphasis added)

This clearly embraces demeanor evidence at the trial examiner level, and the Commission has often recognized the fact, most recently in the case of *Radio Associates*, 10 R.R. 1118a, 1118g. This case after initial decision which involved credibility findings was remanded by the Commission to a second trial examiner with the following instruction:

> ". . . the Examiner should bear in mind, particularly where demeanor or conflicts of testimony are shown to be involved, that it is his predecessor who has heard the witness."

C. McFARLAND ACT CHANGES IN FCC DECISIONAL PROCESSES AND ORGANIZATION

The McFarland Act, 66 Stat. 711, which was approved July 16, 1952, twelve months prior to the decision in this case, made far-reaching changes in the decisional process and internal organization of the Commission for the trial and decision of hearing cases. In passing this legislation, Congress found the Administrative Procedure Act inadequate for FCC case proceedings.*

Any consideration of the role of the FCC *vis-a-vis* its trial examiners or the status of their credibility findings must take into account the 1952 revisions in the FCC's hearing structure.**

The McFarland Act was the " . . . end product of more than a decade of congressional investigations, studies, hearings, and reports by committees in both Houses of Congress." *H. Rep. No. 1750; Conf. Rep. No. 2426*, 82nd Cong., 2d Sess. Most of these changes were enacted by Congress after extended hearings and "lengthy testimony

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* See 23 Univ. of Cin. L.R. (Fall 1954) 469, "A Study of the Significant Departures From the Administrative Procedure Act as Found in the 1952 Amendments to the Communications Act of 1934".

** Communications Act Amendments, 1952, Secs. 4(f)(2); 5(c), (e); 309(b), (c); 402(g), (h); 409(a), (b), (c) and (d).

presented by the Federal Communications Commission . . . opposing many of the provisions contained in these bills." (H. Rep. 1750, p. 2).

The more significant differences between the McFarland Act and the Administrative Procedure Act pertain to (a) trial examiner hearings, (b) FCC review of initial decision, (c) separation of functions and (d) right of parties to a hearing. The following is an outline of these categories as relevant to the role of FCC trial examiners.

(a) Trial Examiner Hearings

(1) Prior to the McFarland Act, FCC trial examiners were forbidden to conduct hearings which involved a "change of policy." *

(2) New Sec. 409(a) requires that *all* hearings, unless held by the Commission *en banc* must be conducted by a trial examiner.**

(3) Authority for the conduct of hearings by a single commissioner or by a panel of commissioners was repealed.

(4) Consultations between trial examiners and staff personnel were prohibited and extended to forbid con-

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* Sec. 409(a), Communications Act of 1934, 48 Stat. 1096.

** H. Rep. No. 1750 on S. 658, 82 Cong. 2d S., pp. 18-20:

Subsection (a), as modified, provides that in every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, the hearing shall be conducted either by the Commission or by one or more examiners provided for by section 11 of the Administrative Procedure Act. That act, in section 2, defines "adjudication" as agency process for the formulation of an order; and it defines "order" to mean the final disposition (whether affirmative, negative, injunction, or declaratory in form) of an agency in any matter other than rule making but including licensing. The principal result of this modification of subsection (a) is that an individual member, or a panel of members, of the Commission or a board of employees (except examiners above referred to), could not, as is permissible at present, conduct the hearing in any such case of adjudication. Speaking broadly, cases of "adjudication" are those in which quasi-judicial functions, as distinguished from rule-making functions, are being exercised.

sultations between the Commission or members of the Commission and trial examiners.*

(5) The McFarland Act requires that the Report of the trial examiner must be an "initial decision", which, in the absence of exceptions and review by the Commission, becomes the final decision of the Commission.**

The import of the above revisions was to make the FCC trial examiner, by statutory mandate, the trier of facts in FCC hearing cases. The trial examiner was further isolated from any *ex parte* presentation and from consultation with any agency personnel including commissioners. The Congressional intent was to further assure that the examiner conducting the hearing would reach his "decision in an impartial and judicial manner, on the basis of the record made at the public hearing."

(b) Review of Initial Decision

(1) The Commission is required by new subsection (b) to permit the filing of exceptions to initial decision,

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* Ibid:

Subsection (c) contains three paragraphs, applying with respect to cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing by the Commission.

Paragraph (1) contains provisions intended to insure that an examiner (or examiners) conducting the hearing will reach his (or their) decision in an impartial and judicial manner, on the basis of the record made at the public hearing. Toward this end paragraph (1) contains three requirements: First, no examiner shall (except to the extent required for the disposition of ex parte matters as authorized by law) consult any person (except another examiner participating in the conduct of such hearing) on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. Secondly, no examiner shall be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative, prosecutory, or other functions for the Commission or any other agency of the Government. Third, no examiner may advise or consult with any commissioner or any member or employee of the Commission (except another examiner participating in the conduct of the hearing) with respect to the initial decision in the case or with respect to exceptions taken to the findings, rulings, or recommendations made in such cases.

** Ibid:

Subsection (b) requires, in case of hearings to which subsection (a) applies, the preparation and filing of an initial decision; directs the Commission to permit the filing of exceptions thereto by any party, and to hear oral arguments on such exceptions before the entry of any final decision, order, or requirement; and prescribes what shall be included in decisions.

to hear oral argument and enter a final decision thereon.

(2) The Commission in case proceedings is prohibited from receiving any presentations off the record from staff bureaus and offices including general counsel, chief engineer, chief accountant, etc.

(3) The FCC decision is required to include a determination upon all material issues of fact, law or discretion presented on the record.

The above changes are and were intended to be more restrictive than those in the Administrative Procedure Act.* The effect was to make the Commission (except where it holds *en banc* hearings) a reviewing body of initial decisions in trial examiner hearings. This statutory arrangement conforms substantially with the *de facto* situation. For example, during calendar year 1954, the FCC's trial examiners entered 72 initial decisions in broadcast cases and a total of 95 initial decisions. The FCC during calendar year 1954 entered only 10 contested decisions on review of trial examiner reports. The Commission itself has not sat *en banc* for the taking of evidence in any case of adjudication since 1946.

(c) Separation of Functions

The decisional processes of the Commission are restricted by the McFarland Act to the following:

(1) Trial examiners.

(2) The statutory review staff, Sec. 5(c).

(3) Members of the Commission.

(4) Confidential assistants to each Commissioner, Sec. 4(f)(2).

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* Ibid:

The provisions of subsections (a), (b), and (c), above described, to some extent contain requirements which are already imposed by the Administrative Procedure Act or under the Commission's own procedural rules. However, in certain respects these subsections contain requirements which are more restrictive than those in the Administrative Procedure Act, and in some cases there is a conflict.

The statute provides that the "review staff" shall be directly responsible to the Commission and shall perform no duties or functions other than in cases of adjudication. Conversely, the Commission may not permit other employees to perform review staff functions. Further, staff and bureau personnel are precluded from participating in hearing cases except as a witness or counsel in public. By these provisions the Commission's organization for case proceedings has been carefully compartmentalized far beyond and above that permissible under Sec. 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c).

(d) Rights of Parties to a Hearing

The McFarland Act enlarged the rights of applicants and of interested persons to a full hearing and to a decision on the record as follows (Sec. 309(b)):

(1) The FCC may not administratively deny an application but is required to notify the applicant of grounds, objections and sources.

(2) The FCC is required to notify "all other known parties in interest."

(3) The applicant must be accorded opportunity to reply, and a hearing, if ordered, is predicated on issues in FCC notice and applicant's reply.

(4) Upon issuing order, FCC is required to notify all parties in interest specifying grounds and reasons for hearing.

(5) Other interested parties, not notified, are given status of a party by intervention.

(6) The hearing is required to be a "full hearing" in which applicant and all interested parties shall be permitted to participate.

(7) A decision is required on the evidence of record on all material issues, and by the decisional processes and organization above outlined.

(8) If reversed on appeal, a further FCC decision must be on the basis of the existing hearing record, unless otherwise permitted by the reviewing court.

The above outline applies to hearings initiated by the Commission.

New Sec. 309(c) additionally permits any party in interest to protest a non-hearing grant by the Commission. A protest requires that the Commission's action be set aside pending hearing on the issues specified in the protest and additional issues, if any, specified by the Commission.

The above outline shows a clear intention of Congress to fortify the rights of interested persons to a full hearing in radio case proceedings, even substantially beyond that recognized prior to the McFarland Act in the *NBC Case*, 319 U.S. 239, and the *Ashbacker Case*, 326 U.S. 327.

The scope and effect of the McFarland Act are such that the Congressional policies therein expressed for the handling of radio case proceedings should be given full effect. See *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498. Those intentions clearly affirming a full hearing for the taking of evidence and a determination upon all issues together with the enlarged responsibilities placed upon FCC trial examiners and their reports do not permit the FCC's arbitrary rejection of demeanor evidence in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in this case should be affirmed.

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